UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fair Isaac Corporation, Plaintiff,	)	File No. 06-CV-4112 (DSD/JJG)
vs.	)	St. Paul, Minnesota
	)	June 4, 2008
Equifax Inc.; Experian Information Solutions, Inc.; Trans Union, LLC; and VantageScore Solutions, LLC, Defendants.	)	10:30 a.m.

BEFORE THE HONORABLE JANIE S. MAYERON

UNITED STATES DISTRICT MAGISTRATE JUDGE

(CIVIL MOTION)

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE CLERK: All rise.

THE COURT: Thank you. You may be seated. Good afternoon everyone -- or good morning, everyone. It seems like afternoon. I am Magistrate Judge Mayeron. We're here this morning in connection with the matter of Fair Isaac Corporation, et al v. Equifax, et al. This is Court File No. 06-4112.

At this time I would like the attorneys to identify themselves starting first with counsel for Fair Isaac.

MR. TIETJEN: On behalf of the Fair Isaac Randy Tietjen from Robins, Kaplan, Miller & Ciresi, and with me is Mary Kiedrowski.

THE COURT: On behalf of Experian.

MR. TOTO: Martin Toto, and I also have my colleague in the back here, Heather Burke.

THE COURT: All right. Make sure I find -- it's Heather Burke?

MR. TOTO: Yes.

THE COURT: All right. All right. And on behalf of TransUnion?

MR. JACOBSON: And Mark Jacobson for Experian of Lindquist & Vennum.

THE COURT: I'm sorry, Mark. All right.

Anybody else on behalf of Experian? All right.

On behalf of TransUnion?

MR. SCHARKEY: John Scharkey from Neal, Gerber & Eisenberg.

THE COURT: I don't think we -- yes, I do. Anyone else on behalf of TransUnion?

MR. SCHARKEY: No.

THE COURT: All right. On behalf of VantageScore?

MS. MILLER: Justi Miller from Kelly Berens.

THE COURT: All right. And on behalf of Equifax?

MS. BONDER: Good morning, Theresa Bonder and with me is Greg Mauldin, also from Alston & Bird.

THE COURT: All right. Have I got all the parties then? I do.

We're here this morning to address plaintiff's motion to compel production of the documents clawed back by defendants or alternatively for an in-camera review.

Mr. Tietjen or Ms. Kiedrowski, whoever will be arguing on behalf of the plaintiff.

MR. TIETJEN: Thank you, Your Honor.

By this motion Fair Isaac seeks production of four documents that were clawed back by the defendants during depositions claiming that the documents reflect privileged communications.

After being clawed back, the documents were either then produced in redacted form by the defendants or withheld entirely by the defendants.

The documents do not reflect privileged communications and if they do, that privilege was waived by the fact that defendants shared all of these communications among each other and some of them with their consultant, Mercer.

I have, Your Honor, for you a single-page timeline which I provided to the defendants at 10:00 to take a look at. With your permission, I will give you a copy, as well. There are two copies.

THE COURT: All right. Do you want to provide --

MR. TIETJEN: Sure.

This timeline sets forth some of the relevant dates for this motion and in red shows the dates the documents fall in the timeline. The timeline relates mainly to the defendants' claim for a common interest.

So I give it to you now and won't address common interest for a couple of minutes yet. And it only covers the events in fall of 2004 up to March of 2006. So it doesn't include, of course, the litigation which began in October of 2006 or any earlier events.

The defendants have acknowledged in depositions that they were talking before the fall of 2004, but for

purposes of the motion, this is the relevant time period.

Now, the defendants make no argument that any of the documents that are at issue in this motion is protected as work product. It is only privilege that they claim. And it is the defendants' burden, of course, to establish that the documents at issue reflect privileged communications.

Without in-camera review I think it would be very difficult for the Court based only on the briefs to evaluate this argument of whether the documents reflect legal advice or request for legal advice.

But I want to point out one fundamental failing in the defendants' record on this motion, and this can alone serve as a basis for granting this motion.

For each of the documents at issue the defendants make no effort to identify the attorneys involved with these communications or anyone else who was allegedly involved in the communications or present at the meetings in which the notes, Plaintiff's Exhibit 41, for example, were taken. These documents are not listed on any privilege log that I know of. They have submitted no affidavit from any party representative or from any lawyer involved in these communications attesting to the privileged nature of these documents, and it is their burden to do this. And because they have failed to assert even the basic elements of a privileged claim, and for that reason alone, Fair Isaac's

motion should be granted.

Now, on this subject of whether the documents are privileged, because I say without an in-camera review it's very difficult to make that assessment, I will leave the other arguments to the briefs which I think adequately address it, unless the Court has any questions.

THE COURT: Why don't you go ahead. I will have questions.

MR. TIETJEN: I will turn to the central portion then of the defendants' opposition to this motion, that is their claim that they had a common legal interest in 2005 that protects otherwise, they say, privileged communications that they revealed to each other or that they exchanged with each other, that is, among the bureau of defendants.

The Common Interest Doctrine, I'm sure you know, is not an independent basis for withholding information as privileged. It's rather an exception to the general rule that if you share communications with someone else, with another party, there's a waiver. So it constitutes an exception to the waiver.

Whether parties can claim that they have a common legal interest requires a pretty close factual analysis, and all the cases bear that out.

Let's consider some of the basic facts that the case law shows are relevant in considering the defendants'

claim that they had a common legal interest.

First, did the bureaus share counsel. This is relevant in much of the case law. If they did share a single counsel, that would strengthen their claim that they had a common legal interest, but they didn't. They were each represented by separate counsel through all of 2005 and to this day, and they acknowledge that. I don't believe it's in dispute. In fact, the difference between them, the differences between them, they have different ideas about what they want to accomplish in this project is well reflected in Exhibit 12 to Ms. Kiedrowski's declaration. This is an exhibit that's a draft of an agreement that they were going to reach with Mercer. And you will see in that where each of the bureaus has its own distinct views about what they want to accomplish in this relationship with Mercer and how they want to memorialize it. Each of their views is listed separately; TransUnion's view is this, Equifax's view is this, Experian's view is this. It's throughout those pages on Exhibit 12. You will see not only -- so we have not only their admission that they had their own counsel, but their work separately is reflected in that document.

A second factual consideration is whether they had formed a joint venture. Had the bureaus formed a joint venture or a partnership or any other legal entity in common

that would give strength to their argument that they had a common legal interest. But here again, and the defendants won't dispute this, they had no joint venture. They had no partnership. They had no common legal entity. That wasn't formed, as you will see on the timeline, until February 14 of 2006 when VantageScore Solutions, LLC was formed.

A third factual consideration in the common interest analysis is whether the parties were anticipating litigation. If they were reasonably anticipating litigation, this too could strengthen their argument that they had a common legal interest. Now, here on this point the defendants had to make a pivot. If they were to argue that they were reasonably anticipating litigation through 2005, then they would be in a bind because they would have to explain why they were shredding documents routinely, frequently throughout that summer. So they made a pivot, and their argument to this Court is we were not anticipating litigation in 2005. That's their argument.

When the day comes for a spoliation motion, I believe we will be able to show in spades that they were anticipating litigation, but that's their position on this motion, we were not anticipating litigation.

And if that is their position they certainly, especially in light of they had separate counsel, no joint venture, they had no common legal interest.

So what does their argument boil down to for why they had a common legal interest? They are very vague about this in their brief, at least I believe they are. But on page 14 they seem to be the most specific about it. They say on page 14 of their brief, "The bureau of defendants shared a common business interest in developing a general credit risk scoring system and a common legal interest in doing so without violating the anti-trust laws."

So let's break that down because that's their whole argument why they have a common legal interest.

First, so they say, they shared this common business interest in developing a scoring system. That is of no consequence to whether they had a common legal interest. A common business interest doesn't establish a common legal interest. They are two different things.

They seem to acknowledge this themselves later in their brief on page 18, that a common business interest is of no consequence where that case stands for the principle if the parties share only a commercial, not a legal, interest it's not within common legal interest.

So then the second part of their argument is they argue that they shared a common legal interest in not violating anti-trust laws. That's it. That is their whole argument for why they had a common legal interest. And the Eighth Circuit has flatly rejected that as a basis for

claiming a common legal interest.

In the grand jury subpoena case, which is cited by both parties in their brief, it involved a Whitewater investigation by the Office of Independent Counsel and the White House made this same -- White House counsel made this same argument. They said the communications between White House counsel and Hillary Clinton should be protected by a common interest because they all needed a full and accurate understanding of what was going on in order to appreciate the legal consequences of their actions. And the Eighth Circuit said -- this is at 112 Federal 3rd at page 922, the Eighth Circuit said that was insufficient. "The justifications amount to no more than an assertion that we all want to obey the law and we do not believe the Common Interest Doctrine stretches that far." If that's all you have, is a claim you all just wanted to obey the law, to follow anti-trust law, that's not enough. It's not enough in the Eighth Circuit, and it's not enough in the Fifth Circuit.

I handed to counsel about an hour ago a case from the Fifth Circuit that's a published decision that is in line with the Eighth Circuit's holding, and with your permission I will give you a copy of that, as well.

THE COURT: Yes. Thank you.

MR. TIETJEN: This is a case involving horizontal

competitors in the offshore drilling business. And the plaintiffs were employees for those horizontal competitors, and they claim that these competing businesses had joined together and sort of fixed their wages and conspired to not increase their wages. If the competing companies shared a memorandum together that they then refused to give to the plaintiffs after litigation began and the companies maintained in that case that they were not anticipating litigation at the time that they exchanged that memorandum, they have said they were just trying to be sure that they didn't violate anti-trust laws, that's the basis for their common legal interest. The court found there was no common interest that protected the exchange of information. On that page, page 714 of that decision, the court said -- I believe the court is quoting from the lower court's decision here, but in affirming it, "but when the threat of litigation is merely a thought rather than a palpable reality, the joint discussion is more properly characterized as a common business undertaking, which is unprivileged and certainly not a common legal interest. There's no justification within the reasonable bounds of the attorney-client privilege for horizontal competitors to exchange legal information which allegedly contains confidences in the absence of an actual or imminent or at least directly foreseeable lawsuit."

Now, there is one more fact that the defendants I expect will argue distinguishes this case from others, and they will say that they all signed a common interest agreement, is what they call it in their brief, in February, 2005.

Now, it's interesting, in their brief they say the agreement is irrelevant so I hesitate to even bring it up. They feel it's irrelevant, it's irrelevant, but they haven't produced it. But, in any event, if their argument is that their only common legal interest was to insure that they didn't violate anti-trust laws, then it doesn't matter if they memorialize that or not and it's not some self-fulfilling prophecy that just because they supposedly said in writing once that they had a common legal interest then it follows they must have a common legal interest. It's really of no consequence if they did sign such an agreement. Again, they won't produce it and they call it irrelevant.

Now, the defendants cite many cases in other circuits involving patent applications where one company is acquiring the assets of another company, and they have discussions regarding the patent application and whether they have common interest since they are acquiring the assets of the other company. They cite cases where the parties had actually formed a joint venture in which they

had a single common legal counsel or cases in which the parties were arguing they were anticipating litigation and that's why they have a common legal interest.

The defendants don't say a word about that Eighth Circuit decision, which holds that mere desire to obey the law, to follow the law, that's what your legal interest is is not enough. They don't say a word about that. And they don't cite any cases in which a court has allowed horizontal competitors who were not anticipating litigation to hide their business communications under the veil of a common legal interest. Those are the circumstances in that Fifth Circuit decision.

Now, one last point: In their response the bureau of defendants avoid the fact that they had this policy for Project Trident to shred all documents and that they carried it out, as I said, frequently and routinely. They seem to no longer assert, as they did in April in this court, that the only documents they shredded were data output or SAS output and I don't think that they could. Their own consultant, Mercer, has testified that they were routinely shredding draft documents. Working papers, handwritten notes were shredded. Instead, they dismiss this whole subject as just irrelevant background in an attempt, they say, by Fair Isaac to sinisterize them. The subject is not irrelevant.

Fair Isaac believes it was the bureau's objective from the outset to make sure that as few pieces of paper as possible survived their project. And discovery has shown, and we have provided some record of this, that the official electronic versions of what still exists does not match up with the few handwritten notes that survived that summer of 2005. Mr. Tantia for Mercer testified just last week that his handwritten notes not only is talking about subjects he didn't then put into his official meeting minutes, which was what was preserved electronically, the handwritten notes got shredded and what we're left with is some partial, what we believe, sanitized record that was preserved electronically.

What this motion is attempting to do is really to reclaim for trial some of these relatively few documents, handwritten notes especially, that escaped the bureau's shredder in 2005.

Now, on the other subjects of whether they have waived any right to privilege in these documents by sharing, for example, some of them with their consultant, Mercer, who they didn't even have an agreement with as you will see from the timeline --

THE COURT: Let me make sure I understand that piece of it. Are you claiming that they shared all four of these documents with Mercer, some of the documents with Mercer or they shared communications with Mercer that end up

being reflected in documents? It's not clear to me what you are saying they shared with Mercer and which of the four documents you are claiming they shared with Mercer.

MR. TIETJEN: You are right, it's not clear to us either. If they had properly asserted the privilege and listed who were the recipients of these documents and who were the authors, we would know. But the only ones we can know for sure Mercer had access to are the handwritten notes.

THE COURT: The ones they generated themselves?

MR. TIETJEN: Which Mercer generated themselves.

The other points, I believe, are adequately addressed in the brief. I will rest there.

THE COURT: Let me see what questions I have then.

With respect to the draft of the anti-trust guidelines that, apparently, were your seeking the draft that was shared in April of 2005 and, apparently, you are saying that was clawed back; is that right?

MR. TIETJEN: Yes. I meant to bring that up. They offered in their brief to produce it. If we have confidential agreement, there is no waiver.

THE COURT: It wouldn't be used, as I interpreted it, to argue that there was a broader waiver than simply providing those draft anti-trust guidelines. So my first question was, and then tell me where I go with it, is that

as to exhibit I think it is 41 (sic), which is -- sorry, not 41, it is the draft guidelines -- 69 -- nope, 71.

MS. BONDER: 71.

THE COURT: Whether their proposal is satisfactory to you or not? In other words, is Exhibit 71 still an issue?

MR. TIETJEN: Well, this is just one -- since that's the only draft guidelines that's the subject of this motion, then that's acceptable. But I would hope the defendants would then produce all of these draft guidelines. There are many more that they are withholding as privileged. If that's their position, is that we can have them if we have an agreement it doesn't represent a waiver, then I believe they should produce all of their draft anti-trust guidelines, not just select this one, which we happened to find among their production and they quickly clawed back. Their privilege log was all kinds of different drafts.

THE COURT: So your view is if they were willing to produce all draft anti-trust guidelines, you are going to argue that by producing those drafts that is broader than simply producing those draft guidelines to you?

MR. TIETJEN: Right.

THE COURT: But if they are only willing to produce Exhibit 71 and they are not willing to produce other draft guidelines, then what is your position? Do you need a

ruling on 71 or you don't?

MR. TIETJEN: We will take what we can get.

THE COURT: All right.

MR. TIETJEN: We will take the document. I think to be consistent they should have to produce all of them.

THE COURT: All right. Just so I know, did they claw this back during a deposition or where did they claw this back?

MR. TIETJEN: During a deposition.

THE COURT: Whose deposition was it?

MR. TIETJEN: During the deposition of Peter Carroll, I believe, who is a director of Mercer. Is that correct? I might be wrong. Stan Oliai who is an employee of Experian.

THE COURT: Okay. So that's where he -- the question regarding Exhibit 71 came up, during his deposition, and at some point they clawed it back?

MR. TIETJEN: Right.

THE COURT: Okay. And did you get any understanding from that deposition as to the circumstances surrounding the communication of those draft guidelines? In other words, did you find out if they had been distributed at a meeting or shared with anyone or you just happened to find them in the file and you started to question him and asked him about what they were? I don't understand the

circumstances of how the draft guidelines were shared.

MR. TIETJEN: They produced some draft guidelines to us -- they produced some guidelines to us. I don't know that they produced any draft guidelines. But it's not clear when it's a draft and when it's a final. So they produced some guidelines to us.

THE COURT: Okay.

MR. TIETJEN: And they claim those aren't privileged.

THE COURT: Okay.

MR. TIETJEN: This one, if I remember correctly, was produced to us and it had at the top just the word "draft." I'm not sure now, but somewhere on the face of the document it said "draft."

So when this was placed in front of the witness, it was just clawed back immediately by the defendants. There was no -- other than like with the handwritten notes, I don't believe there was any delay in clawing this one back.

The basis for clawing it back -- the grounds for claiming it as privileged were not detailed at that time by the defendants. In other words, it's not said who wrote it or who had access to it or how widely it was distributed.

THE COURT: So you did not learn whether, for example, these drafts had been -- draft guidelines had been

distributed at a meeting of a variety of different people?

MR. TIETJEN: These particular draft guidelines?

THE COURT: Yes, the ones you are seeking.

MR. TIETJEN: No. I believe these particular draft guidelines had a date on them of April, March or April. They had meetings before this in which they used other -- what I believe are other versions of anti-trust guidelines. February, for example, they were meeting, the bureaus were meeting in Texas.

THE COURT: I have notes that you indicated that in February, February 16th, there was a meeting of a variety of representatives of the bureaus as reflected in Exhibit 8. And Exhibit 8 to Ms. Kiedrowski's declaration indicates that guidelines, anti-trust guidelines, were distributed or communicated.

MR. TIETJEN: Yeah, the minutes from that meeting list that they had some anti-trust guidelines. Whether these are the same anti-trust guidelines that then are dated a couple months later and now are the subject of this motion or not I don't know.

THE COURT: But you haven't been able to develop whether these draft guidelines were distributed as, apparently, some set of draft guidelines were distributed in February of 2005; is that right?

MR. TIETJEN: Right.

THE COURT: Okay. Let me -- I want to take a look at your timeline.

My understanding from your memorandum is that some time in February the bureaus begin the process of negotiating to retain Mercer as their consultant. Do you have an understanding of when that relationship is formalized with Mercer by agreement?

MR. TIETJEN: It is listed on the timeline about two-thirds of the way down.

THE COURT: That's the September 16th date when they formally retain them and enter into some sort of written arrangement?

MR. TIETJEN: Right. September 16 is the last date on which either one of the bureaus or Mercer signed their agreement. But then they all agreed that it would be backdated to July 12.

THE COURT: All right. And then do you have an understanding of when Mercer's involvement with the bureaus ends?

MR. TIETJEN: It faded. That's our best understanding right now. It faded either in late 2005 or early 2006.

THE COURT: Okay.

MR. TIETJEN: Their involvement -- the point is self-evident. It ended much earlier than when their

agreement was signed.

THE COURT: In Exhibit 40, which is the redacted version of Exhibit 41 that you are seeking, the handwritten notes, at least on the redacted version from time to time in those handwritten notes there appears to be lists of individuals who were in attendance at whatever was happening that's reflected in these notes.

Have you been able to establish who was in attendance at these various meetings that communications were discussed that are reflected by the notes?

MR. TIETJEN: No, we haven't. We only had about 15 minutes or so. The defendants have corrected our time argument. It is 15 minutes of cross-examination of Mr. Carroll of Mercer on these notes before it was clawed back.

THE COURT: But my understanding is you have since had the opportunity to examine the individual who actually took the notes; is that correct?

MR. TIETJEN: Yes, Piyush Tatian.

THE COURT: And, apparently, from what I can tell from your supplemental submission that came yesterday is, apparently, there is some questioning of him regarding the notes?

MR. TIETJEN: Yes.

THE COURT: As part of that did you learn who are the various participants of these communications that he is

reflecting in the notes?

MR. TIETJEN: I don't know if we learned that in any detail or systematic way on this date in this meeting who was present, on this date in this meeting who was present. I don't believe that we did, not attendance at the deposition. I don't believe that was done.

THE COURT: One of the documents you are seeking is document Exhibit 69 which, apparently, is a memo drafted by an Equifax attorney dated April 25th of 2005 to Experian regarding setting out some comments that, apparently, according to the defendants, the lawyer had about Mercer's draft proposal.

Do I have a copy of the final Mercer proposal in the exhibits?

MR. TIETJEN: Exhibit 12 to Ms. Kiedrowski's declaration is one of the drafts that shows all of their competing visions about what the agreement should include.

THE COURT: Okay.

MR. TIETJEN: I should tell you some time soon -- whether there is a final, it was the -- the final was used as an exhibit in depositions.

THE COURT: Okay. You can let me know that. Let me just see here.

As I referenced, you submitted yesterday a supplemental declaration by Ms. Kiedrowski. There is no

reply memo with it. I'm trying to understand the relevance of what you submitted to me --

MR. TIETJEN: Oh.

THE COURT: -- why you submitted those. Do you have some cases and also some deposition testimony?

MR. TIETJEN: I should have submitted a cover letter, but I was out of the office when it was done. The cases are just the unpublished decision that we cited in our brief. We should have submitted those with the brief itself, but we just submitted copies of those.

And then the other materials attached to the declaration are an excerpt of Mr. Tantia's deposition and two exhibits from that deposition that are referenced in that transcript excerpt that show, among other things, that Mr. Tantia, his notes -- what was said in the meetings do not match up with the official documents that were then created and produced.

THE COURT: Okay. All right. Those are the only questions I had.

Were you able to --

MS. KIEDROWSKI: The final is not in there.

THE COURT: All right. Okay. Let me ask you before I ask you to sit down or before you do sit down, there was a writing exchange between the parties with respect to Exhibit 25 of Ms. Kiedrowski's declaration. You

wanted me to hang on to it. Defendants have clawed it back. They wanted me to destroy it. My question is, do you have anything further to say on that issue, other than what's in your letter?

MR. TIETJEN: Well, when the defendants filed a document on my client that we contend is privileged, I believe it is just locked down. It was not destroyed so that not only the court and you have access to it, which we're fine with because it's the same document, among others, we gave to you for in-camera review.

Our position is the same should be done with Exhibit 25, Ms. Kiedrowski's deposition. From our end we will handle it as we're required to under the protective order. We will destroy the copies or return them to defendants, but this document now is going to be the subject of another motion I'm nearly certain, and now the Court can have it for in-camera review. I explained the circumstances in my letter.

THE COURT: Right. I wanted to know if there was anything further you wanted to say. All right.

Why don't I hear on behalf of counsel for defendants. Who will be arguing, Ms. Bonder?

MS. BONDER: Yes, Your Honor. Sorry, I have a little too much to bring up here with me.

Would you like me to start by addressing Exhibit

25?

THE COURT: If you have anything further to add. What I have done is I have right now segregated it. I never looked at it. It is just sitting aside. Before I decide or inform the parties what I intend to do with it, I at least wanted to find out whether they had anything more they wanted to say, other than what was in the written communications to the Court.

MS. BONDER: I just wanted to note one thing: The parties and the Court crafted a protective order to handle just this sort of situation and when the -- and it provides for the return of documents that have been inadvertently disclosed after a party requests the return. When it happened before with Fair Isaac's document, Fair Isaac's counsel called counsel for one of the bureaus and asked us to send a letter to the Court requesting the return of the document. I have Mr. Morris' document for you, Your Honor, that asks the Court to purge the filing and return it to TransUnion, which is what plaintiffs requested. So it was not that we asked you to lock it down. We actually asked you to purge it in return, and that's what we have asked here on our own behalf.

THE COURT: My understanding, just so I'm clear, are you asking that I return it to you or are you asking that I destroy it?

MS. BONDER: We would be happy with either. Whichever the Court prefers.

THE COURT: All right. Let me just address that. My intention is to destroy it. I decided before I would do anything further with it I would at least set it aside and see if any of the parties have anything more to say about it.

The declaration with the attached exhibits of Ms. Kiedrowski, what it will have is tab 25, and there is a note on it now that says destroyed pursuant to request of defendants' counsel letter citing to the letter of -- the letter, the initial one, that came from the Kelly Berens office. I will be destroying it after today's hearing.

Obviously, the defendants need to retain the document, the original document, so that plaintiff has the opportunity to make whatever motion they want to make with respect to it, but I want to make sure the document is retained by defendants and I'm ordering that, as well. But I will go ahead and destroy it.

There is a mechanism in place. I recognize plaintiffs will be likely asking for relief on it, but we're going to follow the mechanism in place, and I am not going to hold the document.

MS. BONDER: Thank you, Your Honor.

THE COURT: All right. Then why don't we then go

to the motion at hand here.

MS. BONDER: Yes. Thank you.

This motion, obviously, is about four particular documents, and I will just introduce them briefly. We believe all of them are attorney-client privilege. They all contain confidential communications to obtain or provide legal advice between lawyer and client. We believe it's clear from the face of each of those documents that that's what it is.

Exhibit 41 is the notes from Piyush Tantia of MOW. We have only redacted legal discussions, and it shows the participants which include lawyers and it shows --

THE COURT: How would I know that they include lawyers? In other words, one of the points made by Mr. Tietjen is there is no affidavit that has been submitted to me, as I understand it, or deposition testimony that tells me who the participants of these meetings are, much less what their titles are, their roles. How would I know that at least looking at the redacted version? I assume the unredacted version won't help me with that either.

MS. BONDER: Correct. There may be a case where it does, but I think generally it does not.

Mr. Tantia did note, for example, on page 69101 that there was outside counsel there. And then you referred, Your Honor, to Plaintiff's Exhibit 40, which are

the typed-up meeting notes from the two meetings on November 16th, and it lists people from the bureaus. It also lists who was outside counsel present and it lists them as outside counsel.

THE COURT: So Exhibit 40 would tell me as to all meetings for which the defendants have redacted information or only certain meetings?

MS. BONDER: As to the November 16th meeting. Some of the redactions are actually requests for legal advice. So they say things like we need to ask the lawyers about this issue or we need to ask -- so it's not necessarily that a lawyer is present. It's referring to a request for legal advice.

So those pages do not identify to whom that advice was -- I mean to whom the request was directed.

Other pages, I believe, do identify lawyers, but I would have to go look page by page and make sure that's correct. I know it does for the November 16th meetings, which are the primary ones at issue.

THE COURT: All right.

MS. BONDER: And I will get into more detail about all of these once I talk generally about the framework for the common interest as well. But just on the attorney-client privilege the -- Exhibit 69 is the memo from Shawn Holtzclaw. He is a lawyer at Equifax. He is

communicating legal advice to his client and Equifax executives and copies of general counsel of Equifax. On its face it's legal advice. It's interpreting the terms and revising terms of what will become a legally binding contract.

THE COURT: And, again, what facts do I have in front of me that the author is -- Shawn, I'm sorry, Holtzclaw, that he is an attorney for Equifax to whom he sent it? What's the factual basis for what you just said that I have in front of me?

MS. BONDER: We know it's from Shawn Holtzclaw. I'm looking at the document. I apologize.

THE COURT: I don't have it. One of the things you are objecting to is an in-camera review. So I'm asking what factual basis right now do I have to believe the defendants' communication that in fact -- or argument that this is by an attorney, who the attorney is, to whom it was directed?

MS. BONDER: Would you mind if I hand up the documents to you for in-camera review?

THE COURT: I wouldn't mind. In fact, I think I was going to order it.

MS. BONDER: I think it would be helpful to our discussion. I arrived earlier assuming, as we did last time, to give you the documents ahead of time. I probably

should have sought you out.

Anyway, the Equifax internal memorandum is from Shawn Holtzclaw. It clearly is legal advice. I can't tell you right now that it identifies him as a lawyer. But I can certainly state in my place as an officer of the court that he is a lawyer for Equifax.

THE COURT: In-house or --

MS. BONDER: In-house, inside lawyer. He is directing the memo to Paul Springman, who is an Equifax CEO, and Ken Mast, and Dana Wiklund. Ken Mast is the general counsel at Equifax.

THE COURT: Again, I haven't looked at it.

MS. BONDER: It should be the second one in there.

THE COURT: Right. But, in other words, looking at the document, Mr. Springman, I would not know his title, correct, nor Ken Mast, nor Dana Wiklund?

MS. BONDER: That's true.

THE COURT: Paul Springman is who?

MS. BONDER: CEO/Chief Marketing Officer.

THE COURT: Who is Ken Mast?

MS. BONDER: The general counsel.

THE COURT: Who is Dana Wiklund?

MS. BONDER: He was previously the Vice President of Predictive Sciences. He is a former employee at this point. At that point he was Vice President of Predictive

Sciences of Equifax.

THE COURT: Predictive Sciences is what?

MS. BONDER: A scoring division within Equifax.

THE COURT: He is an employee in Equifax?

MS. BONDER: Yes.

THE COURT: His role in that division is what?

MS. BONDER: He was in charge of the division that created -- that developed new credit risk scoring models that controls and owns the proprietary Equifax credit scoring models, that develops them, and that consults with the salespeople when they are trying to consider adopting a new credit risk scoring model.

He was also one of the team leaders on Project Trident for Equifax or he really was the team leader, actually, for Equifax with Trident on the joint scoring project.

The anti-trust guidelines are Exhibit 71. They are clearly a draft. It says, "draft."

THE COURT: As I understood defendants' position, they were willing to produce Exhibit 71.

MS. BONDER: So maybe we don't need to discuss it.

THE COURT: I don't think we do. I would suggest that the defendants think about -- apparently, there are other draft guidelines out there.

MS. BONDER: I don't know one way or the other.

THE COURT: All right. I would certainly suggest that -- let me go beyond suggesting. With respect to Exhibit 71, I consider that issue resolved --

MS. BONDER: Okay.

THE COURT: -- based on the representations of defendants in their brief and plaintiff's counsels' presentations.

Having said that, I am going to require that defendants talk among themselves as to whether there are other draft guidelines that exist that have not been produced and whether defendants are willing to produce those, and if they are not to notify plaintiffs. And I don't know whether they are on a privilege log or not, but if you are going to say you are not producing them because they somehow contain privileged information, it seems to me that plaintiffs need to understand why it is you are withholding those other draft guidelines, what's the basis in other words. I think you need to provide them with the date, who drafted them, who received them, if they were distributed, to whom they were distributed.

MS. BONDER: If we have withheld draft guidelines purposefully, as opposed to this one which we meant to withhold and inadvertently produced, they are on a privilege log and should identify those things. I understand what you are saying. We will make it happen.

THE COURT: It's important for plaintiff to understand and to raise this with the Court, why you are treating this draft guideline differently, in other words, why you are willing to produce this draft guideline and not others as well.

MS. BONDER: I think it will require a document-by-document review exactly what statements are contained in there, what is the privilege there for each statement. So I just can't do it off the cuff. I understand.

THE COURT: No, I understand that.

MS. BONDER: Okay. And then so we have three documents.

So the last one, Your Honor, is Exhibit 89, which you should have in front of you. That is an e-mail chain. In the e-mail Mr. Oliai who is an executive at Experian, says after discussing this with my legal counsel. So if you refer up, he is referring to facts he told his legal counsel to obtain legal advice. If you refer down from after discussing this with my legal counsel, he relays the key patents for Project Trident that he received. I was planning to discuss that in more detail in just a moment. In our view on the face of this document it contains privileged information that was inadvertently disclosed.

THE COURT: And, again, I want to make sure that I

understand who the various recipients of this e-mail are or string of e-mails. I don't believe at least in terms of the factual presentation that the defendants have given me that I would have any understanding of what the various roles of these individuals are. For example, I don't have an affidavit from Mr. Oliai indicating that he was passing on advice of counsel, who the counsel was, what it was in response to, whatever communication. I have your brief that says that, but I have no sworn testimony, as I recall, by affidavit, declaration or otherwise to establish those facts. Am I correct about that?

MS. BONDER: You are correct, Your Honor. We felt like the privilege was obvious on the face of the document, but we also had a severe time constraint in pulling together the brief. As you may recall, you were able to give us a two-day extension but not any more. It was over the holiday weekend. All of us were on the road in depositions practically every day. For example, when their motion came in I was in Minneapolis taking a deposition, the next day flew back. When it was due, I was in Minneapolis for three days. All of us have been constantly on the road. So I apologize. But I hope that you will not let this prejudice our clients' interest. If you think declarations are necessary, we could get them to you promptly.

The defendants, the credit bureaus, were clearly

engaged in a common interest. They had -- the question, in our view, is when did it begin. The plaintiffs try to claim that there was no common interest until there was a signing of a joint venture agreement. They mention that as one factor that weighs in favor of a common interest agreement, but in fact they cited no case that says there has to be a joint venture agreement in order for there to be a common interest agreement. I doubt there is such a case.

The plaintiffs' own description of the facts in their brief show that there was a common interest among the credit bureaus throughout 2005 that began discussing joint development in late 2004. They decided to move forward with the joint development project. They entered into a common interest agreement which was effective in February of 2005. They held these meetings in February of 2005, February 16th and February 25th, at which -- both of which they affirmed their commitment to this joint development project. They jointly decided to retain MOW. They signed a confidentiality agreement with MOW effective February 25th where all the bureaus and M OW agreed to maintain the confidentiality of the development project.

THE COURT: Do I have that confidentiality agreement that was signed by all the parties around that time period as either part of plaintiffs' exhibits or your exhibits?

MS. BONDER: I think the answer is yes. Let us look for a moment. I will try to get you the exhibit number, but I believe so. It is cited in plaintiff's brief so I believe it is an exhibit to their brief.

Then the development phase began officially, that is the day-to-day work on the development, began in mid-July of 2005, went through December of 2005. During that period the credit bureau team members, and there were three from each credit bureau who were assigned to Project Trident, they worked on a daily basis all day in an office obtained in Atlanta just specifically for that purpose. So they literally were working alongside each other during that entire period. MOW was also working alongside them during that time period and was clearly a part of that common interest. Under the Eighth Circuit standard that is a common interest.

Mr. Tietjen says that we just ignore the Whitewater-Clinton case, but that's not true. Our brief is based on the elements of a common interest as set forth in that Eighth Circuit case.

THE COURT: But let me ask you, what you have described -- let's assume there is a common interest, but what you have described is a common business interest, in other words, to develop and determine whether to enter into a joint business venture, a joint commercial venture.

What I am not hearing is that there is a common legal interest which, as I recall, is what drives the Common Interest Doctrine in order to determine whether attorney-client communications between and among third parties are going to be -- whether there is going to be a waiver or whether there is going to be -- this is going to be the exception. I'm not hearing the common legal interest.

What I am hearing is a common business and commercial interest. And certainly if it -- while there may be legal issues that come up from time to time on that commercial venture that's being explored by the bureaus, I'm certainly not hearing that that is the predominate interest. Unlike, for example, if you all, as you have now, been sued clearly you have a common legal interest and I don't have -- certainly don't believe that you need a written document to reflect your common legal interest which is to jointly defend against this lawsuit. But I'm not hearing the common legal interest in terms of the activities of the bureaus during this time period when these four documents are being generated.

MS. BONDER: Well, first, I think Mr. Tietjen is setting forth a false premise that it has to be a legal only interest or primarily a legal interest. He cites cases outside of the Eighth Circuit for that proposition, but

within the Eighth Circuit the laws In re Grand Jury Subpoena Duces Tecum, the Whitewater case, and there the court says the common interest may be either legal, factual or strategic in character. That's the standard in the Eighth Circuit.

There are other cases that talk about how there can be a commercial side to a common interest, it can be a commercial venture, you know, outside the Eighth Circuit. But if it's the proper subject for communication with attorneys for purposes of seeking and obtaining legal advice, then it's a subject of common interest. Then it is a common interest.

I was quoting the Fresenius case from 2007 in the Southern District of Ohio. Here there is no doubt there was a commercial interest among the bureaus to create the new scoring model, but given that it was a collaboration among competitors is not surprising that they also shared a keen legal interest in making sure that there were no violations of the anti-trust laws, that there were no violations of the intellectual property laws, that there were no violations of their property obligations. This commercial interest was a proper subject for legal advice. In fact, the bureaus had to have legal advice in connection with their common commercial development project. When that is the case, courts have held that there is a common interest. But,

again, the case in the Eighth Circuit, the Whitewater case, says it can be legal, factual or strategic in character.

Prior to today plaintiff cited only a 1974 South Carolina case on their point that anticipation of litigation is required for a common interest privilege to apply. Today they have brought the Santa Fe case and I, unfortunately, did not get a chance to read it, but as I understand it, there was no joint activity prior to litigation. That is, there was no evidence that the parties had engaged in a joint venture or a common endeavor where their interests were aligned. In fact, the only possible reason for claiming a common interest was the anticipation of litigation. That's all they had. And as I understand it, the document in question was created in 1991 and they were claiming anticipation of litigation that wasn't brought until 2000. So it's not surprising that that common interest didn't work out for them.

The majority of cases hold that the common interest is an extension of the attorney-client privilege and because the attorney-client privilege is not limited to litigation or anticipation of litigation but it is much broader for just when you need legal advice, so is the common interest privilege.

The Eighth Circuit case that controls on the common interest issue refers to the fact that the Common

Interest Doctrine expands the coverage of the attorney-client privilege. It doesn't talk about limiting it in any way. The Fourth Circuit in in re --

THE COURT: The Eighth Circuit case that you are citing to there is which one?

MS. BONDER: It is the 1997 In re Grand Jury Subpoena Duces Tecum. It is 112 F. 3rd 910, same case that Mr. Tietjen is referring to.

The Fourth Circuit says the same thing, extends the attorney-client privilege and no anticipation of litigation is required.

The Seventh Circuit says the same thing in the case the plaintiffs relied on Sulfuric Acid, which is a district court case, its extension of the attorney-client privilege. And because the attorney-client privilege is not limited to litigation, neither should its extension be.

Finally, another one of plaintiff's cases in the Baxter trial, Nollans, it says although a community of legal interest usually arises between parties engaged in or anticipating imminent litigation, litigation or impending litigation is not a prerequisite for the existence of community of legal interest -- of a community of legal interest. That is just a false premise. That is not the law in the Eighth Circuit. And it may not the law anyplace other than the Fifth Circuit. I understand they are an

outlier on this issue, but I don't know for sure whether others follow that or not.

Plaintiffs cite to other non-Eighth Circuit cases about interest being identical. Here the interests were identical. That is, the interests were in establishing -- developing and then establishing a new credit risk scoring model that was legal. If there was no legal process and if the output was not legal it, of course, would not be a successful commercial venture. That was part of their common interest. And their interest in that joint model was identical.

The fact that the bureaus gave comments on an MOW proposal that differed with each other is irrelevant. They were allowed to discuss with each other what would be their view to MOW, what would be their final jointly delivered comments to MOW. In fact, they did that in a meeting in June, 2005.

Mr. Tietjen or, actually, Mr. Tietjen's partner deposed the MOW partners on that meeting. One of them was just on Friday regarding that meeting, and the bureaus gave MOW their collective thoughts on the proposal and ultimately a June 15, 2005 proposal resulted, which I have here. I know you were asking if you had it in connection with the Shawn Holtzclaw memo providing comments on an earlier draft of this. This is the final. It has been an exhibit in

depositions plaintiffs have taken. I would be happy to hand you it.

THE COURT: It is not currently in submissions of plaintiffs or defendants, right?

MS. BONDER: I don't think it is.

What is currently an exhibit is the March 31 proposal that MOW submitted to the bureaus, but it's all black lined and has, you know, electronic comments in it from the bureaus to MOW. That's the collective comments of the group that were delivered to MOW. This is what resulted from those collective comments.

THE COURT: This is the final verse.

MS. BONDER: This is the final verse, right.

THE COURT: I would like to have a copy. What is the number in terms of deposition numbers? It is Plaintiff's Exhibit number -- in whose deposition was it submitted?

MS. BONDER: It was, I believe, in Peter Carroll and Piyush Tantia, the MOW partners.

Would you like me to hand it up? I have two copies.

THE COURT: Sure.

MR. TIETJEN: Can you provide me with the Bates numbers? I think they are different copies that you just gave, aren't they?

THE COURT: This one starts with MOW-FICO 1544.

MS. BONDER: I gave you two different Bates numbers. I apologize. There are several different copies of the same documents that are produced, and there were also several different versions. So it is MOW-FICO-1544.

THE COURT: So is this the final version or is it not? When you say there is "different versions" --

MS. BONDER: This is the final version.

THE COURT: There are not different versions of the final version?

MS. BONDER: There are.

THE COURT: Okay.

MS. BONDER: I believe there is another version of the final version. It was a draft and this resulted.

THE COURT: So this is the final final version?

MS. BONDER: That is the final, final, final. That's my understanding.

All right. So with respect to the commonality of interest and having differing views on a particular proposal, that is Equifax's view that this, were it needed to be changed, was not the same word Experian's counsel suggested needed to be changed, that did not render their common interest a divided interest.

The McPartlin case, Seventh Circuit, 1979 says the common interest privilege is not limited to situations where

the positions of the parties are compatible in all respects. In that case they upheld the privilege even though the co-defendant sought a separate trial due to claimed conflicts of interesting.

In re mortgage and realty trust, which is the Southern District of California, 1997 case says the common interest does not require complete unity interest among participants. The privilege applies where -- even where the -- I apologize. In re: Mortgage and realty trust, Central District of California, 1997, it says that it does not require, that is the common interest does not require, a complete unity of interests among the participants. The privilege applies where the interests of the parties are not identical and it applies even where the parties' interests are adverse in substantial respects. That case was related to a bankruptcy debtor and creditors' committee having a common interest. Again, the creation of a joint venture is not required for a common interest. There is no case that says it was.

You know, while there may have been a common interest as of the signing of the joint venture agreement, and we would argue that certainly it extended through and beyond that time period, in 2005 the parties were engaged in a joint development project and that project required joint legal advice to insure the legality of the process, to

structure and plan for a new product launch and to determine patentability.

THE COURT: What are you referring to here? Are you reading when you talk -- is this --

MS. BONDER: I am not citing a case.

THE COURT: You are not citing a case. Are you citing some testimony or something out of a document as to what the purpose of the joint venture was or is it just your summary of it?

MS. BONDER: It's just my argument.

THE COURT: You refer to this joint venture or some sort of joint commitment agreement or common interest agreement that was entered into by the bureaus, I believe, in the middle of February of 2005.

MS. BONDER: It was effective in February of 2005.

THE COURT: Effective as of that date which, on the one hand, you indicated was irrelevant to my analysis but, on the other hand, offered it for an in-camera review. If you could speak to that issue.

MS. BONDER: Well, I think the point about it being irrelevant is just that you don't need a writing to reflect a common interest agreement. It can exist without a writing, just like a joint defense agreement can exist without a writing.

THE COURT: Do you have a copy of that with you as

well?

MR. MAULDIN: We do, Your Honor. I believe it is Exhibit 10 to the Kiedrowski declaration.

MS. BONDER: That's the confidential agreement which I think you asked about.

THE COURT: I was asking in regard to the common interest agreement that was signed or entered into by the parties in which you offered it up as a footnote 7, defendant's common interest agreement has been withheld from production because it's irrelevant, protected by attorney client and common interest privileges, but you would produce it if I wanted it for an in-camera review.

MS. BONDER: Sure. We are still, obviously, claiming privilege as to that document.

THE COURT: Yes, I understand. The record will reflect it has been handed to me, the common interest and joint defense agreement that was entered into as of February 15, 2005, a copy of that document along with the other documents which are the subject matter of this motion for relief for an in-camera inspection and have not been provided to plaintiffs at this point.

Go ahead.

MS. BONDER: Why don't we, if you don't mind, turn to Exhibit 41 to look at that specifically. Exhibit 41 are the notes of Piyush Tantia, a partner at MOW who was working

practically, if not completely, full time on the joint project part of Trident of the bureaus.

The document contains notes from various meetings that are not in perfect order clearly. They are sort of interspersed in places. And it also contains other documents that are attached; an agenda, e-mail chart. It's sort of a confusing document. But the meetings that are reflected in the document run from June, 2005 to November, 2005.

THE COURT: All right. And the redacted version, just so I'm clear, of Exhibit 41 that you then ultimately did provide to plaintiffs is what exhibit number so that if I am comparing the two --

MS. BONDER: I think it is 40.

THE COURT: You refer to Exhibit 40 a little differently. I wanted to make sure I understood.

MS. BONDER: Sometimes we are referring to plaintiff's Deposition Exhibit 40, which are the non-privileged, produced, typed-up meeting notes of the November 16, 2005 meeting.

THE COURT: All right.

MS. BONDER: That is also attached as Exhibit 4.

THE COURT: Exhibit 4 to which affidavit or declaration?

MS. BONDER: Exhibit 4 -- which did that come

from, plaintiff's?

MR. MAULDIN: Yeah.

MS. BONDER: I think it is the plaintiff's motion, excuse me.

THE COURT: So Exhibit 4 is Plaintiff's Exhibit 4, Deposition Exhibit 41 (sic) which is the typed-up version of the notes?

MS. BONDER: It is Deposition Exhibit 40, not 41. That is the one that lists the outside counsel present at those November 16, '05 meetings.

And I misspoke. The redacted version of Exhibit 41, that is -- the redacted version of the handwritten notes is Plaintiff's Exhibit 155. And it is attached as Exhibit 6 to plaintiff's motion. Is that where it's attached?

MR. TOTO: I believe that is the reply.

MS. BONDER: Oh, it must be to the reply.

THE COURT: The supplemental affidavit that was provided to me by Ms. Kiedrowski, is that what you are saying?

MS. BONDER: Yes. Yes. I apologize.

THE COURT: All right. So plaintiff's supplemental Exhibit 6 is the redacted version of the handwritten notes that plaintiffs are seeking as Exhibit 41, correct?

MS. BONDER: Yes. Yes. And this is the document

that -- or one of the many documents that plaintiff's counsel examined Mr. Tantia, the auther of the notes, about in his deposition last week.

THE COURT: The redacted version?

MS. BONDER: Yes. Yes.

So it's important to note that the defendants have not been trying to go beyond what is clearly attorney-client privileged communications. That is, you may recall in plaintiff's document where defendants brought a motion to compel a document and we were in front of Your Honor a couple of months ago or on that motion to compel, Fair Isaac was claiming privilege as to all documents related to a particular scoring project that they had. Regardless of whether the statements actually contained attorney-client privileged statements, they said that all of it was too intertwined, the legal issues were too intertwined with business issues. And they were claiming privilege on not just that document, but all documents relating to that particular scoring strategy project. We are not doing that. We are claiming privilege just on the statements that reflect attorney-client privileged communications. That may be why Mr. Tietjen is focused on a legal basis for a common interest when the Eighth Circuit doesn't require it. They have gone way beyond just legal, and so they are interested in making sure that there is some ground for the common

interest or else it could be anything. Here we're only talking about the legal part of the common interest. That's all we're redacting. In fact, we have produced thousands, maybe hundreds of thousands of pages related to Project Trident. We produced 2.3 terabytes of documents and data from the development process and that included MOW meeting notes, draft meeting notes, agendas and their drafts, presentations to the teams, presentations to more senior members of the credit bureaus. It included paper documents and electronic documents. We were not trying to hide anything, and we have not hidden behind the privilege in that situation.

The redacted portions of Mr. Tantia's notes of Exhibit 41 reveal what we consider to be legal advice and those are the only portions that we redacted. It talks about the LLC structure and role, who should be the owner of the algorithm, the permissible education, sales and marketing of the joint product. That's all pages 6, 9, 113, 69117 to 69118.

THE COURT: Of the unredacted version.

MS. BONDER: That we have handed up in camera. It talks about intellectual property issues at 69110. It includes questions from the non-lawyers that are reflected there saying things like what can we legally do, what are the real options. Those questions are followed by legal

advice that clearly touch on matters like anti-trust, intellectual property, contract, Fair Credit Reporting Act issues. Our view, on its face those portions are privileged.

We believe the common interest likewise applies, the common interest being extension of the attorney-client privilege, because it relates to these portions related to legal advice about the joint project. It's relevant to all the members of the joint project and the project manager so that they can put in place a permissible process, follow through with a legal process and produce a scoring model that doesn't violate the laws, all legal matters common to the Project Trident participants.

And, as I have said, plaintiffs have deposed the author of this document. They have deposed another partner at MOW, Peter Carroll. They have deposed many of the participants in these meetings that are reflected, and other depositions of the participants in these meetings are to come. The final meeting notes that are a typed-up version I have mentioned have been produced. The agendas have been produced.

My point is there are a myriad of documents that relate to these meetings. No one is trying to withhold the facts related to these meetings. Nobody is trying to withhold what was discussed at these meetings. They can

obtain that information through the depositions and through the many other documents that relate to all these different meetings. All we're trying to redact are the actual attorney-client privileged communications.

If you don't have any more questions, I will move to the next document.

THE COURT: Let me just see. No. Go ahead.

MS. BONDER: Okay. I will turn to Exhibit 69, which is the Holtzclaw memo to Paul Springman and others.

What this document reflects is comments, as it says, to the Mercer proposal dated March 31, 2005. This document is dated April 22, 2005. It's clearly during the scope of the common interest, and it is an Equifax lawyer giving his comments on a legally-binding contract to Equifax personnel.

The June 15th proposal that I have handed up to Your Honor, that was the final of the document that's being commented on here was actually attached to the MOW agreement and the statement of work. It specifically references the June 15, 2005 proposal and incorporates it herein. We will find that agreement, but it's in the exhibits that have been produced to you.

THE COURT: Say that again. Attached to Exhibit 69 was what?

MS. BONDER: Exhibit 69 is commenting on a draft

proposal.

THE COURT: Yes.

MS. BONDER: The final of that proposal, June 15th proposal --

THE COURT: Is the one you have given me.

MS. BONDER: -- was attached and incorporated in reference between the bureaus and MOW. It became part of that contract.

THE COURT: I see. All right.

MS. BONDER: My only point there is these are comments on a contract, on what would ultimately be a legally, binding contract.

Because commenting on contracts that set forth the rights and obligations of parties is typical of lawyer services, it is attorney-client privileged. It doesn't include legal research, but that's not the standard for what is legal advice, and there are cases that say that. The Rossi case, for example, in New York, 1989 says it doesn't -- the fact that it doesn't reflect legal research is not determinative. Where the communication concerns legal rights and obligations and where it evidences other professional skills, such as lawyer's judgment and legal strategies, it is privileged.

And, again, we did not withhold our collective comments. Plaintiffs make some suggestion that we are

trying to claim privilege on negotiations with MOW, but in fact we produced our collective comments on their proposed draft that we gave to MOW.

The common interest applies because this is part of the bureau's formulating a joint legal strategy for responding to the MOW proposal. Once they did that they turned over their joint comments to MOW and those were produced. But this is no different from a contract being circulated internally on a privileged basis with comments, and then once it gets forwarded to the other side, it's produced. But that doesn't mean that the comments on the contract that were kept internally among the privileged group were somehow waived.

In the Weeks case that the plaintiffs cited in the last round of briefing, 1996 Westlaw 2885, a matter committed to a professional legal adviser is prima fascia so committed for the sake of legal advice and is, therefore, within the privilege. And then there are several cases that we cited in our brief that talk about as long as the legal advice is predominate it doesn't have to be solely legal advice. Here I think it is solely legal advice.

If you don't have any further questions on that, I will turn to the next one.

THE COURT: No, I don't.

MS. BONDER: Okay. We will skip the anti-trust

guidelines and move to Exhibit 89, which is a series of two e-mails. In this e-mail, as I mentioned earlier, Stan Oliai, who is an executive at Experian, and you can see that from his e-mail address, discusses something at the top and then begins to talk about the patents that the joint venture, that the common project, the Project Trident could obtain on the new scoring -- credit risk scoring model that they had just created. You will see midway through the redaction it says, "After discussing this with my legal counsel." If you look above that --

THE COURT: I'm sorry, which page am I on?

MS. BONDER: The -- I'm sorry, the second page of that exhibit. And the "please let me know your thoughts" is not redacted but the lines above that are. So if you look above "after discussing this with my legal counsel," it discusses patent ideas and Experian's view of what the joint venture, the project, Trident, could obtain as patents. And then after that statement, "after discussing this with my legal counsel," he relays the real advice he receives regarding Project Trident's patents.

So both of those, before and above that statement, are privileged because they reflect confidential communications to an attorney for purposes of obtaining legal advice and then they relay the legal advice.

In the Eighth Circuit under Zion, clients'

statements that disclose legal advice are privileged. And this is, obviously, relevant to the common interest because it's relevant and actually it directly addresses the Project Trident patents, what can the project, the joint project, obtain as patents.

THE COURT: I can see the language on page 5, 68121 that says, "After discussing this with my legal counsel," and then goes on to express Experian's views on things, what you are saying is the result of advice by legal counsel; is that right?

MS. BONDER: Yes.

THE COURT: All right. And then you -- the next piece, as you said, and then it goes on to describe what he intends to do with that legal advice; is that what you are saying?

MS. BONDER: No, I'm saying that after the, "after discussing this with my legal counsel" statement, all of that is relaying what he learned from his legal counsel.

THE COURT: Everything after that? All right.

MS. BONDER: Yes.

THE COURT: You are saying everything above that line that says, "after discussing this with my legal counsel" -- what are you stating that represents?

MS. BONDER: Do you see where it says, "competes with the new score" at the end of the top paragraph there on

the second page?

THE COURT: Yes.

MS. BONDER: After that, not including "competes with the new score," but after that, all of that appears to be facts that he told his legal counsel in order to obtain legal advice.

THE COURT: How would I know that looking at this document?

MS. BONDER: Well, in my view when he says, "after discussing this with my legal counsel," he is referring to what he said right above. That's what this refers to.

THE COURT: Okay.

MS. BONDER: Okay. One more thing we have to discuss with respect to Exhibit 41 and that is the role of Mercer Oliver Wyman. As you mentioned earlier, the Mercer Oliver Wyman is the only one of these documents that's -- Exhibit 41 is the only document that has been claimed to be shared by Mercer Oliver Wyman. In fact, it was created by Mercer Oliver Wyman discussing meetings and rationale for the modeling decision was one of the roles MOW had as project manager for Project Trident. They were literally in the same room with the development team day after day model building and project management and discussing their expertise in the industry. Mr. Tantia so testified. They were obligated to confidentiality, as you have seen in the

confidentiality agreement that has been submitted. And, frankly, we would not have shared these kinds of communications if they weren't necessary to their role for the project.

In Exhibit 41 they were given legal advice, along with the development team, because as part of their job they had to implement a process that did not violate the laws; otherwise, they did not produce a successful credit risk scoring model.

In re Bieter, an Eighth Circuit case from 1994, is directly on point here. In that case Klohs, who was not an employee but was a consultant to the company, Bieter, is acting on behalf of the company. The court noted that he was intimately involved in the company's sole objective, which was the development of a real estate project. He was involved on a daily basis. He was an independent contractor just like MOW's agreement says that it is on behalf of the company. MOW was likewise intimately involved in the sole objective of the project. And the court said that although he was not an employee of the company, he could be considered a representative of the company for purposes of the anti-trust -- attorney-client privilege, and the court deemed him the functional equivalent of an employee.

And a representative of a client for purposes of legal privilege include non-employees who possess a

significant relationship to the client and the client's involvement in the transaction that is the subject of legal services. I'm quoting from the Bieter case.

So the Bieter case considered whether the communications at issue were, in fact, legal communications, the provision or obtaining of legal advice, and the court found that the communications at issue were legal advice and it made the statement when a matter is committed to a professional legal advisor, it is prima fascia for legal advice and in the privilege absent showing to the contrary. That is a quote from the Eighth Circuit case. Here our communications in the three documents are legal communications and the only ones redacted in Exhibit 41 are attorney-client privilege communications.

The court assumed that the independent contractor in that case was part of those conversations because it was directed by the superior. And we can make that same assumption here because MOW was in the room with the credit bureaus hearing the legal advice from the credit bureaus' lawyers as part of his duties. And that was the next factor that the court considered, is whether the subject of the communications were within the scope of the agent's duties. And the court said, well, because the independent contractors' duties are actually coterminous with the objectives of this company, then they necessarily fall

within the duties.

We have the same situation here. MOW's duties were coterminous with the objectives of Project Trident. So the communications necessarily fell within their role. They were the project manager asked to run the project and make sure it got done.

And, finally, the court looked at confidentiality and said the confidentiality requirement exists as an indication of the intent of the client and the attorney to keep a communication confidential. And the court concluded that the communications were kept confidential. There was no evidence that they were not. It was just that counsel and the company and the independent contractor who were involved in these communications, and the same is true here, it is just the bureaus, and MOW, and the lawyers. We see that from the face of the document and from Exhibit 40 where it lists again the participants in the meeting.

One case that I will also refer to is JP Morgan case, which is a case that the plaintiffs rely on on the common interest. It is really not relevant to our situation on the common interest issue because in that case they were pre-merger discussions between JP Morgan and Bank One. They were on opposite sides of the transaction. The court noted that if one succeeds in getting its best deal, then the other one necessarily suffers and, therefore, their

interests are adverse because it's a pre-merger agreement. Then the court said once the parties' interests were aligned so an agreement was signed, then they did share a common interest in insuring that the merger met regulatory conditions and that the merger was approved. And that was enough of a legal interest for them to share a common interest there. But the reason I cite it in connection with MOW is because there was a consultant in that case, an investment adviser. It was another JP Morgan entity, JP MSI. The court said even if we assume that JP --

THE COURT: Go slower.

MS. BONDER: So if we consider this consultant as an independent third party because it was involved in providing advice that was held in confidence by the proper recipients and its task was to use the knowledge that JP Morgan's attorneys gave to it in order to provide investment advice regarding the merger, it was within the privilege.

So that seems directly analogous to MOW's role. They are also within the privilege. They need this information in order to be able to provide their services to Project Trident.

Lastly, Your Honor, the plaintiffs claim that we waived the privilege in Exhibit 41 during a deposition of Mr. Carroll. I would note that we have a protective order that deals with the inadvertent disclosure of privileged

documents. It requires a prompt return of the inadvertent documents that have been disclosed and it requires the return of the documents. Once that has been accomplished, the protective order says specifically there shall be no waiver or subject matter waiver as a result of the inadvertent disclosure. I believe under the protective order it just was the recall of the document promptly made upon discovery.

The defense counsel were not expecting Exhibit 41 to be presented at Mr. Carroll's deposition. When they looked at it, they did not immediately recall it. As you can see, it is a long, handwritten documents. It's difficult to read. The dates are on different pages. The defense counsel tried to read it during the deposition so as not to interrupt the flow, and it took them 15 minutes to make the determination that it was likely privileged. They then stopped the deposition. They met for eight minutes. They came back and clawed the document back. There was certainly no intention of waiving any privilege on Exhibit 41.

I'm happy to talk about that further if you would like.

THE COURT: No, I don't think it's necessary.

MS. BONDER: Okay.

THE COURT: I would like a copy of that segment of

the transcript from, I think it is, Mr. Carroll's deposition where the handwritten notes are discussed before they are clawed back. My understanding is that segment of the deposition has not been provided --

MS. BONDER: Hasn't been provided to anybody.

THE COURT: -- to anyone. To the extent I were to determine, for example, that Exhibit 41 was not appropriately clawed back, it seems to me I will also be determining that the testimony that was provided in connection with it until the claw back is also appropriate for plaintiff to have. In any event, in order to have a context for how this became clawed back, I would like to have a copy of that segment of the deposition. I don't know if you have that with you or not.

MS. BONDER: We don't have it. It was never given to defense counsel at all. We asked the court reporter to maintain it under seal and not give it to anybody.

THE COURT: All right.

MS. BONDER: I assume if I ask they will give it to me.

THE COURT: You tell them I ordered it.

MS. BONDER: That will work.

THE COURT: Let me see if I have any other questions that I want to ask of you.

What I would like to do is take a short break. I

have a couple questions, but I need to take a look at the documents in order to frame the questions, I believe. So we're going to just take a short recess and we will come back.

MS. BONDER: Your Honor, I wanted to make sure the sealed portion of the transcript was just for in-camera review; is that right?

THE COURT: Yes, that is correct. Let me make sure, as I asked the parties to make sure that I was -- when I look at the unredacted notes, which is Exhibit 41, and compare them with the redacted notes, which as I understand it you are now referring me to the supplemental declaration of Mary Kiedrowski, I think Exhibit 6 --

MS. BONDER: Correct.

THE COURT: -- I pulled when I was going through these items Exhibit 20 to Mary Kiedrowski's original declaration which also appeared. If they are one in the same, I just want to make sure. That appeared to me to be the redacted version of what is Exhibit 41; is that correct?

MR. TIETJEN: They are the same with the exception that Exhibit 6 to her supplemental affidavit bears the deposition exhibit number so then when it's referred to in the transcript that's also, you know, what they are referring to.

THE COURT: Otherwise, it's one in the same?

All right. We're going to take a short recess. Why don't we say five minutes and we will come back. Thank you.

MS. BONDER: Thank you.

(A brief recess was taken.)

THE CLERK: All rise.

THE COURT: Thank you. You may be seated. All right.

I have no questions, further questions, that I wanted to direct to the defendants.

Anything further on behalf of the plaintiffs?

MR. TIETJEN: Thank you, Your Honor.

Just a few points: This is a housekeeping matter, but I quoted from the Eight Circuit case in the Subpoena Duces Tecum how --

THE COURT: In re Grand Jury or --

MR. TIETJEN: I'm sorry, In re Grand Jury, the desire to obey the law is not sufficient to establish a common interest. That's on page 922. So 112 F 3rd, page 922.

THE COURT: Right. That's what I wrote down.

MR. TIETJEN: Did I say it already? Unfortunately, I forget what I say.

THE COURT: I wrote it down, in any event.

MR. TIETJEN: I will use it as a transition to my

next point. I still have not heard them state any common legal interest beyond what the Eighth Circuit has recognized is not; that is, just a desire to obey the law.

Now, before we get to that, they did say that they all signed a confidentiality agreement and you had asked if it was in the record and it is. The agreement that they signed with Mercer, it's Exhibit 10 to Ms. Kiedrowski's first declaration.

You will see there that it is -- it also doesn't reflect any common legal interest. It's at best a common business interest. They just say let's be sure everybody keeps everything secret. That's the gist of it. It is a garden variety, common confidentiality agreement. Everybody keep quiet about this. Don't tell anybody. That's not a common legal interest. That's a common business interest.

Now, they have provided to you in camera what apparently is labeled a joint defense and common interest agreement; very interesting. That's how one of them listed it on their privilege log, too, as a joint defense and common interest agreement. They are trying to do all they can to avoid disclosure of any evidence that they were actually anticipating litigation. A joint defense agreement implies just that. But, again, their position on this motion is that they were not anticipating litigation. That's their position. What they are left with doesn't

constitute a common legal interest.

Also, I believe that they say the effective date on that agreement that they have given you in camera was in February. I don't know when it was actually signed. I just recommend you look at that because I do know from their agreement with Mercer that they are willing to backdate things several months before. So they will sign them later and they will make them effective several months before that just because they say it's effective.

So their only agreement is -- their only assertion for a common legal interest is that they wanted to obey the law and that is not enough under Eighth Circuit precedent.

With respect to the specific exhibits, Exhibit 40, the handwritten notes --

THE COURT: I'm sorry, Exhibit 40?

MR. TIETJEN: Plaintiff's Exhibit 41, the handwritten notes of Mr. Tantia from Mercer.

THE COURT: The ones you are seeking?

MR. TIETJEN: Right, the ones we're seeking. There are many redactions throughout those handwritten notes. It is not clear when -- if those notes are taken -- some places it is very unclear whether the notes are taken out of a particular meeting, if they are Mr. Tantia's notes later from a telephone conversation. It's not clear from many of those redactions just who was present, what the

legal advice was, who the attorneys were that were conveying it. So each of those redactions is something that, again, the defendants have failed to assert even the basic grounds for a privilege on.

They only referred to one place, I believe, in the meeting in the notes that they say lists some of the meeting participants, but you will see as you go through it sometimes he doesn't list the participants at all. Sometimes you are left wondering if it's a telephone conversation or just his own musings. You just don't know.

With respect to Exhibit 69, you will see on Exhibit 1 to Ms. Kiedrowski's declaration at page 356, this is the transcript, at the moment when they clawed this back, that --

THE COURT: I'm sorry, this would be Kiedrowski exhibit --

MR. TIETJEN: Exhibit 1 is the transcript when they clawed back.

THE COURT: All right, at page --

MR. TIETJEN: Exhibit 69 at page 356, that document which they clawed back they had already redacted when we marked it as an exhibit. So, in other words, they reviewed it, decided whether it's privileged, fine, produced it to us, we put it in front of the witness at a deposition and they said, oh, we're going to take it back again. They

have taken the whole thing back now. In other words, they want a couple of chances to decide what portions or if all of it was privileged. Mr. Beehler notes that on the record at that page. I will just note for the record the document you have just clawed back is already redacted.

With that, I will close.

THE COURT: All right. Anything further on behalf of defendants?

MS. BONDER: May I just take a minute? I just wanted to address of couple things, if you don't mind.

Mr. Tietjen is talking about the lack of legal interest. As I mentioned, there is a legal interest related to our common interest, but what Mr. Tietjen did not respond to is the fact that the Eighth Circuit, which is the authority here, says that the common interest may be either legal, factual or strategic in character and so I commend you to that case.

He also refers to the Eighth Circuit saying that just a desire to obey the law is not sufficient for a common interest privilege. Here, of course, we don't have just a desire to obey the law in general is what they were talking about in the Whitewater case. But here we're talking about specific legal advice in a specific factual situation where the legal advice was relevant to each of the members of the joint project. And what the holding really was in the

Whitewater case is not that they didn't have a legal interest in common, but what they said is that Mrs. Clinton's interest was in avoiding prosecution. The White House doesn't share that interest. "One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest in not being prosecuted." So it's not so much that there was a general obey the law interest because the court does not require that there be a legal interest at all.

With respect to the anticipation of litigation issue, again, as you know, we're not claiming that as a basis for our common interest. We knew that Fair Isaac would be upset. That is, the bureaus knew Fair Isaac would not like having any competition in the credit scoring market. They were not used to any competition. They were monopolist for a long time. We knew they would probably have some reactions, they would probably have some competitive response. We did not know that the response would be litigation, but we knew that was one of the possibilities. We thought perhaps there would be a more appropriate competitive response. But, you know, in fact, it was one of the possibilities just like when you are drafting a contract for a client, you include dispute resolution provisions. You include an arbitration clause perhaps or a venue provision perhaps. That does not mean

you are in anticipation of litigation. There's no notice of a potential claim at that point. That's what's required for anticipation of litigation.

And I wanted to just refer you to footnote 2 of defendant's brief, the last paragraph and it's the all of the if's that would have to occur for the defendants to actually have been anticipating that Fair Isaac would respond to new competition by filing this lawsuit. If the project resulted in a workable credit scoring model and if the defendants then decided to bring it to market and if Fair Isaac then considered the credit risk score a threat to its business, which was not a foregone conclusion given its monopoly power, and if Fair Isaacs had a baseless lawsuit, then there would be litigation. And that's just too tenuous to constitute anticipation of litigation and, again, it's not required in the Eighth Circuit for a common interest privilege.

I think that's all I had, unless you had any questions.

THE COURT: I do not. All right. I will take this matter under advisement.

As I understand it, the only thing that I ordered the defendants to produce to me that I do not yet have is that segment of the deposition from Mr. Carroll's deposition where the questioning regarding the handwritten notes takes

place and then is clawed back, the document is clawed back, and I need that copy of the transcript, that piece of it.

MS. BONDER: We will do that.

THE COURT: All right. That concludes this proceeding. Thank you very much.

(Court adjourned at 12:40 p.m.)

* * *

I, Debra Beauvais, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Debra Beauvais
Debra Beauvais, RPR-CRR